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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DAVID CARTER III,

Defendant and Appellant.

G040205

(Super. Ct. No. 06CF1527)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed, remanded for resentencing only.

Christine Vento, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

Michael David Carter III appeals from the judgment entered following his conviction, by a jury, of kidnapping to commit a sex offense (Pen Code, § 209, subd. (b)(1); count 1)<sup>1</sup>; three counts of forcible rape (§ 261, subd. (a)(2); counts 2, 3, & 8); sodomy by force (§ 286, subd. (c)(2); count 4); forcible oral copulation (§ 288a, subd. (c)(2); count 5); and sexual penetration by a foreign object (§ 289, subd. (a)(1); count 6). The jury deadlocked on count 7.

With respect to counts 2 through 6 and 8, the jury also found true several enhancement allegations under section 667.61, also known as the “One Strike” law: the jury determined that Carter had (1) moved the victims, which increased her risk of harm during the commission of the crimes (§ 667.61, subds. (d)(2)); (2) kidnapped the victims during the commission of the crimes (§ 667.61, subd. (e)(1)); and (3) used a knife during the commission of the crimes (§ 667.61, subd. (e)(4)). The court sentenced Carter to life with the possibility of parole for count 1, plus six indeterminate terms of 25 years to life for counts 2, 3, 4, 5, 6, and 8.

On appeal, Carter claims the judgment should be reversed because (1) the prosecutor committed misconduct, (2) his attorney performed inadequately, (3) the trial court gave erroneous jury instructions, and (4) the court violated the ex post facto provision of our state and federal Constitutions by sentencing him under a version of section 667.61 that was not in effect at the time he committed the crimes. We agree with Carter’s final argument and remand to the trial court to conduct another sentencing hearing using the correct test. However, judgment is affirmed in all other respects.

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<sup>1</sup> All future statutory references are to the Penal Code unless otherwise indicated.

I  
FACTS

*Jennifer D.*

On September 28, 2005 at approximately 10:00 or 11:00 p.m., then 16 year old Jennifer D.<sup>2</sup> was walking on Washington Street in Santa Ana on her way home from her boyfriend's house. Jennifer saw Michael Carter smoking a cigarette and asked him for one. Carter said he did not have a cigarette and asked Jennifer if she "wanted to go smoke some shit." Jennifer said she did, and she rode with Carter in his car to get some methamphetamine. Jennifer later explained that she had been smoking methamphetamine daily for three months prior to this incident.

Jennifer told Carter she was 16 years old, and Carter said he was "30 something." Carter drove to a mobile home park, where he knocked on the door of one of the mobile homes, but no one responded. After that, Carter took Jennifer to a shed in the mobile home park, but did not do anything untoward. According to Jennifer, Carter was "sketch[ing] out" and "panicking," and she tried to calm him down.

Carter and Jennifer left the mobile home park and drove around for 15-20 minutes more before he drove into a self-storage parking lot. While driving around in the storage parking lot, Carter saw a police officer and made a quick left turn and parked. He told Jennifer to slouch down in her seat. Carter said "My God, the cops, the cops." Jennifer tried to calm him down, again, and then "all of a sudden" she realized Carter had put a knife to her neck. She had seen Carter hold and open a knife with a four to five

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<sup>2</sup> The parties stipulated that Jennifer had been arrested on November 24, 2007 for possession of methamphetamine and admitted to possessing methamphetamine with the intent to sell. She also admitted that her heavy methamphetamine use had caused her to have hallucinations and some paranoia in the past, but that she remembered what happened on the night of September 28, 2005. Further, she testified while dressed in jail clothing.

inch long blade, but she hadn't been afraid because he made it seem like something that was "cool."<sup>3</sup>

After sensing the knife at her throat, Jennifer said, "Oh my God, what are you doing?" Carter told Jennifer to "shut up" and became "angry" and "violent." He tried to kiss Jennifer on the neck, but she told him she didn't want to be kissed. Carter said he wanted to "fuck her," and she realized that he was going to rape her. He tried to kiss her and then said "he wanted to make love to her." Jennifer was afraid and told Carter to just let her go, but he refused.

Carter drove to a nearby park and parked a couple streets away from it. Jennifer was "shocked" and "freaked out of [her] mind" and thought Carter was going to kill her. Carter told Jennifer if she tried to run away he would kill her. He also told her to wait in the car while he walked around the car to open the passenger door. When he opened the door, Carter ordered Jennifer to get out of the car grabbed her hand, and walked her to a dark area in some bushes. Carter told Jennifer that he was carrying the knife, and he would not let go of Jennifer's hand. She also realized that Carter was physically larger.

Carter walked Jennifer to the back of the park near some bushes where there was no lights and took off his shirt. He again told Jennifer he wanted to "fuck her," and he directed her to lie down, shut up and not move. Carter removed Jennifer's shirt and one leg of her pants and partially removed his own pants. He put his mouth on Jennifer's left breast and "all over the place." Carter held Jennifer down and raped her. After the rape, Jennifer put her clothes on and walked back to the car with Carter. She thought Carter left a shirt at the park, but one did not materialize during a subsequent investigation of the area.

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<sup>3</sup> She had seen Carter with two knives earlier that night.

They drove to a Jack in the Box restaurant parking lot, and Carter parked his car and walked into a nearby gas station. Jennifer sat in the car because she was too scared to leave. She said hello when a friend walked by the car. Her friend got into the back of the car, and Jennifer told him Carter had raped her while Carter filled his car with gas. Her friend tried to persuade her to leave, but Jennifer said she was too scared to do so. The trio purchased hamburgers and ate in Carter's car.

A Huntington Beach police officer on patrol in the area approached the car and saw Carter, Jennifer, and her friend sitting in the car, he became suspicious because the area is known for drug trafficking. The officer called for backup and then conducted a search of Carter's car interior and trunk. At trial, the officer was unable to recall if he found any contraband in the car, but Jennifer was taken into custody and transported to the Huntington Beach Police station. She did not mention the rape while at this location, but she did tell an officer she had been raped at the point of a knife after she was taken to juvenile hall for being a runaway.

The following day, Jennifer was taken to the hospital and examined by a forensic nurse practitioner. The examination revealed that Jennifer had a laceration in the area just below the vaginal opening and a bruise on her back. The nurse collected a DNA sample from Jennifer's right breast. Subsequent testing matched genetic material collected from Jennifer's right breast to Carter's DNA. No sperm or semen was found in any of the samples, but Jennifer thought Carter used a condom or a balloon, and she was not certain he had ejaculated. At trial, the nurse who conducted the physical examination testified that Jennifer's injuries were consistent with her explanation of how the rape occurred.

*C.P.*

On December 7, 2005, then 16 year old C.P. took a bus from Huntington Beach to Santa Ana to meet her friend Marcos. Marcos and C.P. then went to a friend's

house. About 20 minutes later, Carter arrived at the same house. Marcos and C.P. asked Carter to buy them beer and Carter complied. C.P. said she drank a 40 ounce beer. Carter and Marcos' friend, Cloe, smoked methamphetamine.

About an hour later, C.P. said she had to leave to catch a bus back home. Carter offered her a ride to the bus stop, and C.P. got in Carter's car. Instead of taking her to the bus stop, Carter drove C.P. to a dark parking lot in back of a school or park, and he said that he was going there to deal drugs. Carter got out of the car and left C.P. inside the car. When he returned to the car, he asked C.P., "Do you want to fuck?" C.P. said no, but Carter grabbed her by the neck and pushed her against the car seat, and told her to do everything he said or he would stab her. C.P. did not see a knife, but Carter put something in his pocket. She later told an investigating officer that she had feared for her life.

Carter told C.P. to stay in the car while he got out and walked around to open the passenger door. Carter demanded she get out of the car, and he put his arm around C.P.'s shoulder. He forced C.P. to walk with him to a tree in a corner of the parking lot. Carter pulled down his pants and asked C.P. to suck his penis and to stick her finger up his anus. C.P. complied. Afterward, Carter took C.P.'s belt and said he was going to give it to his daughter.

While Carter walked C.P. back to his car, he told her that he wanted to go to a sex store. He threatened to put her in the trunk because she was under 18 and would not be old enough to go into the sex store. Instead, he drove to a WalMart store and made C.P. go inside with him. He told her to laugh and act happy while they were in the store, and he warned her that if she screamed or said anything he would stab her. Carter stole a pair of underwear and bought a black corset with garters, black underwear, and some lubricating gel. He never used the underwear or lubrication gel, but while purportedly driving C.P. to her home, he forced her to put her hands down her pants,

touch her private parts, and act like she enjoyed it. He also handed her a small metal tool and told her to put it in her vagina.

After C.P. complied with his requests, Carter asked if she was a virgin. When she said that she was, he drove her to another park and told her to climb the fence in the front of the park. C.P. climbed the fence and Carter followed. As they walked through the park Carter started kissing C.P.. He threw her up against a map of the park, Carter ripped her shirt off, and told her to take off the rest of her clothes. C.P. complied and Carter undressed himself. He took C.P. inside a porta-potty and told her to put her leg up on the wall. Then he raped and sodomized her and directed her to act as if she enjoyed it.

Carter then moved C.P. to a park bench and told her to lay down on it. When she did, he raped her. C.P. started to cry and said she wanted to talk to her mother, but Carter told her to shut up. He directed her to open her mouth and ejaculated into it. When C.P. told him she had to urinate, he told her to urinate while he was having sex with her. When she did not bleed, he accused her of lying about her virginity. Sometime during this series of incidents, Carter put his mouth on C.P.'s vagina. Later, they both got dressed and walked back to his car.

Afterward, Carter drove C.P. to a Jack in the Box restaurant, parked in the parking lot, and smoked methamphetamine. He gave C.P. some methamphetamine to smoke. C.P. said she smoked the drug so that Carter would not kill or stab her, and in an attempt to calm down and stop shaking. Carter told C.P. to put on the black corset that he had stolen from WalMart, and C.P. complied.

As the sun rose the next morning, Carter drove C.P. to a parking lot near the ocean in Huntington Beach. She told Carter that she wanted to go home, but Carter said that he wanted to repeat what they had done earlier. He told C.P. that if she cooperated he would take her home, but if she did not, he would stab her. Carter made C.P. walk with him along the beach and hold his hand. He then forced C.P. inside a

bathroom by the pier. He pushed her against the bathroom wall and started kissing her neck. When C.P. gave him a dirty look, he put his hand around her neck and said, “if you don’t do this, you might not make it home.” Carter took C.P.’s clothes and the black corset off, and directed her to put one leg on the toilet and turn around. C.P. complied and Carter sodomized her. C.P. complained that he had hurt her, but Carter told C.P. to lie on the floor. Carter vaginally raped C.P. and ejaculated on her chest. C.P. redressed, and Carter drove her to her Huntington Beach home. During the drive, he admitted to her that he had had done the same things to an Asian girl not that long ago, and he threatened to have someone chop her up if she told anyone what had happened. Carter used his phone and acted like he was calling someone, and told someone to kill C.P. if she reported his activities to the police.

When C.P. arrived home that early morning, her mother said she looked like a “wreck,” “her hair was a mess, her clothes were a mess,” and she was upset and crying. C.P. told her mother she had been “kidnapped, for several hours . . . and raped.” C.P.’s mother called the police. The responding officers interviewed C.P. and took her to the hospital for a sexual assault exam. The forensic nurse who examined C.P. testified that C.P. appeared disheveled, her jeans were inside out, her hair messy, and she was crying and shaking. The nurse observed two bleeding hymeneal tears at the bottom of the opening of C.P.’s vagina, two anal tears at the top of her anus, a bruise on her thigh, a scratch mark on her left hand, an abrasion on her right wrist, and a red stain on her underwear.

At trial, the nurse testified that C.P.’s injuries were consistent with C.P.’s statements about what had happened to her. Subsequent DNA testing matched Carter’s DNA to samples taken from C.P.’s body. A DNA profile that matched C.P. was found on a metal tool she said Carter forced her to insert into her vagina. After the attack C.P. was shown a six pack photographic lineup, and she identified Carter as the man who attacked her.



Carter testified at trial. He admitted having sexual intercourse with both girls, but claimed that they had consented to this activity. He denied forcing either girl to do anything sexual. He had been arrested while with Jennifer for possession of marijuana, and he claimed he explained to the arresting officers that he had had consensual sex with her. He testified that C.P. wanted to get high with him, and that they stopped at the WalMart to buy condoms, which led to consensual sex. While they were driving around, looking for methamphetamine, C.P. voluntarily inserted the chrome tool into her vagina. They later walked the beach together, and she suggested they have sex in a public bathroom. Carter admitted he had sodomized her on his own initiative. He then drove C.P. home and gave her his telephone number. He claimed that he did not use a condom.

With respect to both victims, Carter claimed his initial denial of any sexual activity with either victim was the result of his failure to remember their names. He denied using a knife during the encounter with C.P..

## II

### DISCUSSION

#### *Prosecutorial Misconduct*

Carter contends the prosecutor's closing argument constituted misconduct because she asked the jury to view the crime through the eyes of the victim, appealed to the sympathies of the jury, effectively testified as an unsworn witness, denigrated the criminal justice system, misstated the law, and implied the jurors would be responsible for future crimes if the defendant was not convicted. Carter also argues that if any one error is insufficient to reverse the judgment that the cumulative effect of these statements caused prejudicial error. We disagree.

“A prosecutor's conduct violates a defendant's constitutional rights when the behavior comprises a pattern of conduct so egregious that it infects “the trial with unfairness as to make the resulting conviction a denial of due process.”” (*People v.*

*Mendoza* (2007) 42 Cal.4th 686, 700.) Under state law, a prosecutor who uses deceptive or reprehensible methods commits misconduct even when those actions do not result in a fundamentally unfair trial. (*People v. Lopez* (2008) 42 Cal.4th 960, 965.) ““To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.”” (*People v. Wilson* (2005) 36 Cal.4th 309, 337.)

As a preliminary matter, we note that defense counsel failed to object to the prosecutor’s argument at trial and therefore waived his right to appeal. (*People v. Benson* (1990) 52 Cal.3d 754, 794.) Nevertheless, we have reviewed each contention and conclude the prosecutor’s statements did not constitute reversible error.

Carter first contends the prosecutor made several prejudicial statements at trial. During closing argument, the prosecutor invited the jurors to “take a walk” with the victims on the nights of the attacks. The prosecutor asked the jury to feel what the victims felt on the night of the attacks and to consider those feelings when considering if the acts were consensual. She referred to Jennifer as a “throw away kid,” and told the jury to “not throw [her] away.” The prosecutor also told the jury to “walk him [Carter] out that door” if they found that the girls had consented to the sexual acts committed by Carter. The prosecutor continued by telling the jury that if the DNA lab had worked “a little harder . . . or faster” the defendant could have been apprehended before he committed his attack on C.P..

“It has long been settled that appeals to the sympathy or passions of the jury are inappropriate at the guilt phase of a criminal trial.” (*People v. Fields* (1983) 35 Cal.3d 329, 362.). However, it is also true that a litigant’s appeal to sympathy does not grant a reviewing court carte blanche to reverse the judgment of a jury. Generally, “[a] defendant’s conviction will not be reversed for prosecutorial misconduct . . . unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.” (*People v. Crew* (2003) 31 Cal.4th 822, 839.) By

directing the jury to see the crime through the eyes of the victim, the prosecutor appealed to the jury's sympathy for the victim, and as such, the statements were improper.

Nevertheless, in light of the substantial evidence of Carter's guilt presented at trial, we find there is no reasonable probability of a more favorable result in absence of this misconduct. The testimony of the victims, experts, and police supported the jury's verdict and findings. Though the two victims never talked with one another prior to trial, their testimonies about the details of the attacks are strikingly similar. Both victims testified that Carter used a knife and threatened to kill them if they were uncooperative. The victims' testimonies revealed that the defendant's modus operandi was to lure his victims into his car and then drive them to secluded locations, where he threatened them with a knife, then sexually attacked them. C.P. and Jennifer were examined shortly after the attacks by forensic nurse practitioners. Both girls had tears to their vaginas, and the nurses testified that these injuries were consistent with their accounts of how the attacks occurred. DNA evidence also corroborated their testimony. Carter's DNA was found on Jennifer's breast and on C.P.'s anus and mouth. C.P.'s DNA was also found on the metal tool she said Carter forced her to insert into her vagina.

Furthermore, defense counsel minimized the prosecutor's actions during his own closing argument. Counsel repeatedly referred to the prosecutor's argument as an appeal to emotion and not an appeal to logic or reason. Defense counsel made it clear to the jury that they were to consider the facts without letting passion or sympathy affect their decision. Moreover, the court specifically instructed the jury to decide the matter without letting "bias, sympathy, prejudice or public opinion" influence their decision. Under these circumstances, we conclude the prosecutor's appeals to sentiment did not amount to prejudicial misconduct, much less violate Carter's state and federal Constitutional right to due process of law.

Carter also complains that the prosecutor's statement that Jennifer was a "throw away kid," constituted unsworn testimony. We disagree. "[A] prosecutor is

given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]” (*People v. Wharton* (1991) 53 Cal.3d 522, 567-568.) The prosecutor’s reference to Jennifer being a “throw away kid” was a reasonable inference from the evidence because Jennifer testified at trial that she was afraid to tell police what Carter had done because she was a “runaway.” Jennifer also testified that she had been using methamphetamine on a daily basis for three months preceding the attack and was “running amuck” on the streets. Thus, the prosecutor’s statement was based on a reasonable inference about Jennifer’s living situation at the time.

Relying on *People v. Newman* (1931) 113 Cal.App. 679, 686, 688, Carter also claims the prosecutor denigrated the justice system by arguing that the crimes against Jennifer and C.P. continued into the courtroom. We disagree.

In *Newman*, the prosecutor expressly questioned the validity and efficacy of the judicial system during closing argument. Here, by contrast, the prosecutor merely attempted to convey to the jury that Carter’s crimes had a continuing impact on the victims. Though the argument may have been an improper appeal for sympathy, we do not consider the argument comparable to cases such as *Newman* because here the prosecutor’s argument focused on victim impact, not the efficacy of the criminal justice system.

Carter further claims the prosecutor’s statement constitutes a misstatement of law. “[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” (*People v. Ayala* 23 Cal.4th 225, 284.) Here, there is no reasonable likelihood the jury would have misconstrued the prosecutor’s remarks. The argument was clearly an attempt to convey to the jurors the lasting effects of sex crimes on the victims and was not an attempt to

instruct the jury on the law. Further, the jury received instructions from the court specifically detailing the applicable law. Thus, any misunderstanding of the law was duly corrected by the court's instructions.

### *Ineffective Assistance of Counsel*

Carter contends his attorney failed to object to several incidents of alleged prosecutorial misconduct, to contest the jury instructions related to count one, to request a limiting instruction for the evidence presented of uncharged offenses, or to adequately prepare for trial. We find these arguments meritless.

“In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]” (*People v. Williams* (1997) 16 Cal.4th 153, 214-215.) We further recognize that “trial tactics are ordinarily within the sound discretion of trial counsel.” (*People v. Wright* (1990) 52 Cal.3d 367, 412.) “In evaluating defendant's showing we accord great deference to the tactical decisions of trial counsel.” (*In re Fields* (1990) 51 Cal.3d 1063, 1069.) In reviewing an appeal on grounds of ineffective assistance of counsel we are mindful that “[i]t is defendant's burden to demonstrate the inadequacy of trial counsel.” (*People v. Lucas* (1995) 12 Cal.4th 415, 436.)

First we address Carter's assertion that his counsel failed to object to several instances of alleged prosecutorial misconduct. From the record, it appears Carter's attorney made a tactical decision to address the prosecutor's alleged improper statements during his own closing argument rather than object during the prosecutor's

closing argument. Defense counsel argued that the prosecutor was trying to take the jury's "eye off the ball" by appealing to the sympathies of the jury and remarked that the prosecutor was attempting to tweak their emotions and arouse their passions. Counsel continued to address the prosecutor's statements by telling the jury that the prosecutor was simply appealing to "something other than reason and logic." Furthermore, defense counsel incorporated the prosecutor's "take a walk" argument in his own closing argument, telling the jury to "have a couple of bowls of methamphetamine before you take the walk." Defense counsel also told the jury that the prosecutor was daring them to cut loose the defendant, and that this dare was improper.

Defense counsel spent a substantial amount of his closing argument rebutting the statements of the prosecutor that are now being appealed rather than object as they arose. Counsel's decision to address the prosecutor's statements in this manner was a reasonable tactical decision, and we cannot conclude that counsel performed ineffectively by making this particular election. As a reviewing court we give great deference to the tactical decisions of trial counsel. (*In re Fields, supra*, 51 Cal.3d at p. 1069.)

Next, Carter argues that defense counsel was ineffective by failing to object to the court's jury instruction on count 1. Carter was charged in Count 1 with aggravated kidnapping in violation of section 209, subdivision (b)(1). Section 209, subdivision (b)(1) provides, in pertinent part, "Any person who kidnaps or carries away any individual to commit robbery, rape, spousal rape, oral copulation, sodomy . . . shall be punished by imprisonment . . . ." The court gave a jury instruction that mirrors the statutory language.<sup>4</sup>

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<sup>4</sup> The court gave the following instruction: "The defendant is charged in Count[s] 1 and 7 with kidnapping for the purpose of rape or sodomy or oral copulation or sexual penetration by foreign object, in violation of Penal Code section 209(b). To prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant intended to commit rape or sodomy or oral copulation or sexual penetration by foreign

Carter argues the kidnapping instruction did not properly instruct the jury on the elements of “force or fear.” Contrary to Carter’s contention, the instructions clearly addressed this element. As noted, the instruction contained the following language: “Two. Acting with that intent, the defendant took, held, or detained another person by using force or by instilling a reasonable fear; Three. Using that force or fear, the defendant moved the other person or made the other person move a substantial distance . . . Five. The other person did not consent to the movement.” The instruction also direct the jury “[t]o decide whether the defendant intended to commit rape or sodomy or oral copulation or sexual penetration by foreign object by force or fear,” and told the jury to “refer to the separate instructions that I will give you on those crimes.” The court subsequently instructed the jury on the other crimes and elaborated further on the requirement of force or fear in the commission of those acts. Thus, the court’s instructions adequately defined the crime charged in count 1, and defense counsel had no obligation to object to an otherwise proper instruction. (*People v. Price* (1991) 1 Cal.4th 324, 387 [counsel not ineffective for failing to make futile objections].)

Carter also argues his attorney committed error by failing to request a limiting instruction on uncharged crimes evidence. At trial, the court admitted evidence suggesting Carter committed several uncharged sex offenses, including unlawful sexual intercourse with a person under 18, drug possession, giving drugs to a minor, and theft. With the possible exception of the theft, the evidence was relevant to prove Carter’s intent and to establish a common plan scheme or design. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.) The commission of theft-related offenses is relevant to

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object; 2. Acting with that intent, the defendant took, held, or detained another person by using force or by instilling a reasonable fear; 3. Using that force or fear, the defendant moved the other person or made the other person move a substantial distance; 4. The other person was moved or made to move a distance beyond that merely incidental to the commission of a rape or sodomy or oral copulation or sexual penetration by foreign object; and 5. The other person did not consent to the movement. And 6. The defendant did not actually and reasonably believe that the other person consented to the movement.”

credibility. Furthermore, as noted above, a reviewing court gives great deference to counsel's tactical decisions. (*In re Fields, supra*, 51 Cal.3d at p. 1069.) From the record, it appears defense counsel decided to address evidence of uncharged offenses in his closing argument. While it would not have been error to request a limiting instruction, we find no prejudice as a result of counsel's decision to not request such an instruction given the state of the evidence adduced at trial.

Carter further contends the court had a sua sponte duty to give a limiting instruction on the evidence of uncharged offenses. We disagree. Under Evidence Code section 355,<sup>5</sup> a judge is only required to give a limiting instruction when requested by the parties. Our California Supreme Court has further stated, "Neither precedent nor policy favors a rule that would saddle the trial court with the duty either to interrupt the testimony *sua sponte* to admonish the jury whenever a witness implicates the defendant in another offense, or to review the entire record at trial's end in search of such testimony. There may be an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*People v. Collie* (1981) 30 Cal.3d 43, 64.) However, that is not the case here.

The uncharged crimes evidence presented in this case was relevant to the jury's determination. Accordingly, evidence of those crimes was properly admitted at trial. This is not a case, as alluded to in *Collie*, where evidence of other crimes was minimally relevant to the determination of the charged offense. Thus, the court did not have a sua sponte duty to give a limiting instruction to the jury.

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<sup>5</sup> Evidence Code section 355 states, "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."



Carter also contends defense counsel failed to adequately prepare for trial. He argues his trial attorney was appointed after the public defender and alternate defender had declared conflicts, and that counsel did not make any pretrial motions and seemed to lack knowledge of Evidence Code section 782, one of the rape shield laws. However, “[i]t is the defendant’s burden to demonstrate the inadequacy of trial counsel. We defer to counsel’s reasonable tactical decisions and indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” (*People v. Anzalone* (2006) 141 Cal.App.4th 380, 394.) Here, Carter merely speculates that a pretrial motion to exclude evidence may have convinced the court to exclude some of the prosecution’s evidence, including evidence of a machete found in Carter’s car, and that if counsel had been familiar with Evidence Code section 782, he would have refrained from making remarks about Jennifer’s prior sexual history in opening argument. However, we find no reason to reverse the judgment based on this speculation because the court admonished defense counsel during opening argument to not discuss Jennifer’s prior sexual conduct further. As for the failure to make pretrial motions, it is entirely speculative whether any such motion would have prevailed. Thus, we find counsel’s trial preparation fell within the bounds of reasonable conduct.

### *Ex Post Facto*

At the sentencing hearing, the court imposed sentence on all counts and ordered each count to run consecutively to each other. The court referred to provisions of the One Strike law (§ 667.61), section 667.6, subdivision (d),<sup>6</sup> and California Rules of

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<sup>6</sup> Section 667.6, subdivision (d) states, “A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions. [¶] In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior.

Court, rule 4.426, when imposing sentence, and stated, “these crimes are committed on separate occasions, even though they involve the same victim.” The court further indicated that it had “analyzed all the facts” and “looked at the law,” including *People v. Jones* (2001) 25 Cal.4th 98 (*Jones*), and determined, “that Mr. Carter had a reasonable opportunity to reflect upon his actions after each crime he committed.”

Carter claims the court utilized the wrong test to impose sentence and run each count consecutively because he committed the instant crimes in 2005 when former section 667.61, subdivision (g) was in effect. That subdivision provided, “The term specified . . . shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified . . . shall be imposed on the defendant once for each separate victim. Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable.”

In *Jones, supra*, 25 Cal.4th 98, our Supreme Court held, among other things, that the phrase “single occasion” as found in former section 667.61, subdivision (g), meant “a sequence of sexual assaults by defendant against one victim that occurred during an uninterrupted time frame and in a single location.” (*Jones, supra*, 25 Cal.4th at p. 107.) The court interpreted this section in light of the “separate occasion” language of section 667.6, subdivision (d) (*Jones, supra*, 25 Cal.4th at p. 103), and but stated, “for the

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Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions. [¶] The term shall be served consecutively to any other term of imprisonment and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison.”

purposes of Penal Code section 667.61, subdivision (g), sex offenses occurred on a ‘single occasion’ if they were committed in close temporal and spatial proximity.” (*Jones, supra*, 25 Cal.4th at p. 107.)

It is clear the court did not refer the proper test when sentencing Carter, although the district attorney’s sentencing memorandum acknowledged the change in the law and set forth the correct test for single occasion as stated in *Jones, supra*, 25 Cal.4th at p. 103.)<sup>7</sup> Therefore, we believe the matter must be remanded for a new sentencing hearing.

The ex post facto clause of the California Constitution is analyzed in the same manner as the federal provision. “Article I, section 10, clause 1 of the federal Constitution states in pertinent part: ‘No state shall . . . pass any . . . ex post facto law . . . .’ Article I, section 9 of the California Constitution similarly states that an ‘ex post facto law . . . may not be passed.’ The California provision is analyzed in the same manner as its federal counterpart.” (*People v. Castellanos* (1999) 21 Cal.4th 785, 790.) What constitutes a violation of the ex post facto provision has been clearly defined by the courts. “For a criminal or penal law to be *ex post facto*, it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.” (*Weaver v. Graham* (1981) 450 U.S. 24, 24.) “In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party’s liability for, an event, transaction, or conduct that was *completed* before the law’s effective date.” (*People v. Grant* (1999) 20 Cal.4th 150, 157.) “As relevant here, any statute ““which makes more burdensome the punishment for a crime, after its commission”” violates the ex post facto prohibition.” (*People v. King* (1993) 5 Cal.4th 59, 79.)

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<sup>7</sup> The probation department report did not specify a sentencing range or discuss the issue, and neither party objected at the sentencing hearing.

Carter was convicted of committing several sexual offenses against C.P., including two counts of forcible rape, forcible sodomy, forcible oral copulation, and sexual penetration of a foreign object by force. With respect to these crimes (counts 1 – 6), Carter argues that the court violated the ex post facto provisions of both state and federal Constitutions by imposing consecutive indeterminate terms of 25 years to life on counts 4, 5, and 6. He asserts two of the three terms must be reversed because the forcible sodomy charged in count 4 occurred in close temporal and spatial proximity to either the forcible rape in counts 2 or 3, and that the forcible oral copulation charged in count 5 occurred in close temporal and spatial proximity to the forcible sexual penetration with a foreign object charged in count 6.

At the time Carter committed the offenses, in 2005, the test for determining whether an act occurred on a “separate occasion” was whether the acts occurred “in close spatial and temporal proximity” to one another. Therefore, although, the current test for determining whether an act occurred on a separate occasion is whether the defendant had a “reasonable opportunity to reflect” upon his actions before committing a separate offense (Stats. 2006, ch. 337, § 32), the trial court should have determined whether Carter committed his crimes in close “temporal and spatial proximity” as outlined in *Jones*. (*Jones, supra*, 25 Cal.4th at p. 107.) Therefore, we remand the matter for a new sentencing hearing to permit the trial court to utilize the sentencing standard applicable to the date of Carter’s crimes.<sup>8</sup>

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<sup>8</sup> Nothing in this opinion should be construed as a statement of views that leniency is in order. We leave this matter in the good hands of the trial court.

### III

#### DISPOSITION

The matter is remanded for a new sentencing hearing in accordance with the views expressed in this opinion. In all other respects, the judgment is affirmed.

SILLS, P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.